

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000585-MR
AND
NO. 2005-CA-001387-MR

HAROLD W. GARDNER

APPELLANT

v. APPEALS FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NOS. 04-CR-00138 AND 04-CR-00170

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, SCHRODER, AND VANMETER, JUDGES.

ACREE, JUDGE: Harold W. Gardner (Gardner) appeals his convictions in Muhlenburg Circuit Court on charges of Carrying a Concealed Deadly Weapon, Possession of a Controlled Substance with firearm enhancement and Possession of Drug Paraphernalia. For the reasons stated, we affirm.

On September 24, 2004, Harold Gardner was pulled over for suspicion of Driving Under the Influence by Deputy Wade Griggs of the Muhlenburg County Police Department. Deputy

Griggs asked Gardner if he had any drugs or weapons on him and Gardner affirmatively answered that he had a handgun in his back pocket. Gardner claimed to have a concealed carry permit but did not have it with him. A records check revealed that Gardner did not have a permit to carry a concealed deadly weapon, nor had he ever been issued a concealed carry permit, and he was subsequently arrested.

During the search incident to arrest, Deputy Griggs recovered two pouches containing methamphetamine, empty baggies, three lighters, and several "boats" or pieces of aluminum foil in which methamphetamine is placed in order to smoke it.

Gardner was charged with Possession of a Controlled Substance with a firearm enhancement, Carrying a Concealed Deadly Weapon, and Possession of Drug Paraphernalia. On February 16, 2005, Gardner was found guilty on all counts and sentenced to serve ten years.

Between his arrest and conviction on these charges, Gardner engaged in criminal activity resulting in additional charges and subsequent convictions. On October 7, 2004, Gardner, while out of jail on bond, went to Commercial Printing in Greenville, Kentucky, and asked if the employees there could make picture ID cards with his photo on them. After being informed that they could not, Gardner ordered a ream of blue parchment paper. The next day, Gardner returned to Commercial

Printing and showed them a certificate provided by the State upon completion of a gun safety class. Gardner asked the employees if they could use the blue parchment paper he ordered to print certificates of completion of training with his name on them or, alternatively, print certificates of completion with the name area left blank. The employees informed Gardner that they could not do so because it would be illegal. Gardner became upset and left Commercial Printing, taking a portion of the ream of blue paper without paying for it. After Gardner left the store, the employees called the police.

On October 11, 2004, the Sheriff of Muhlenburg County and several Deputies procured and executed a search warrant on Gardner's home to find the ream of blue parchment paper stolen from Commercial Printing. The search uncovered drug paraphernalia, methamphetamine, two firearms, and three forged concealed deadly weapons permits. Two of the cards had Gardner's name and picture on them. Gardner was subsequently arrested.

While in custody, Gardner made two statements which were reduced to writing on his behalf. In the first, he admitted to trying to hide drugs and drug paraphernalia before the police could find them. In the second statement, Gardner admitted that he went to Commercial Printing and asked the employees to make concealed deadly weapons permits and

certificates of training completion for him. Gardner also admitted that he possessed forged concealed deadly weapon permits.

Gardner was indicted for Possession of a Controlled Substance with a firearm enhancement, Possession of Drug Paraphernalia with a firearm enhancement, Tampering with Physical Evidence, and Forgery in the Second Degree. He was found guilty on May 17, 2005, on all counts and was sentenced to serve fifteen years. Gardner separately appealed both the February and May verdicts. These appeals have been consolidated in order to render one opinion. We will discuss issues common to both convictions first, followed by the issues pertaining to Gardner's February 2005 trial and, finally, those raised concerning his May 2005 conviction.

Gardner argues in both appellate briefs that the trial court erred when it overruled his motion to disqualify the Commonwealth's Attorney based on Gardner's claim of a conflict of interest. While still in private practice in 1997, the Commonwealth's Attorney represented Gardner in dissolution proceedings. Gardner and his wife eventually entered into a reconciliation agreement and a divorce was never finalized. After July of 1997, the Commonwealth's Attorney had no further contact with Gardner concerning the divorce. The trial court

was correct in finding no continuing, ongoing representation of Gardner by the Commonwealth's Attorney.

Gardner cites Kentucky Supreme Court Rule 3.130, Professional Rule of Conduct 1.11, and claims that this provision prohibits his former counsel from serving as the prosecutor in this later criminal matter. This rule states, at subdivision (c):

Except as the law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

- (1) Participate in a matter which the lawyer participated personally and substantially while in private practice or nongovernmental employment. . . .

An attorney is prohibited from participating in the prosecution of a later criminal case "if by reason of his professional relations with the accused he has acquired a knowledge of the facts which are closely interwoven therewith

. . . ." *Whitaker v. Commonwealth*, 895 S.W.2d 953, 956 (Ky. 1995). Here there is no substantial relationship between the 1997 divorce proceedings and the 2005 criminal action. Gardner does not, and cannot, assert that any facts gathered by counsel during the dissolution had bearing on the later criminal charges. The vast differences between the two actions should indicate there was no possibility of conflict between the divorce proceedings and the later criminal action. We conclude that the Commonwealth's Attorney is no longer legally bound to

represent Gardner and there was no conflict of interest in the present case.

Gardner next asserts that during the February 2005 trial, the trial court erroneously permitted the prosecution to introduce evidence that he forged a concealed deadly weapon permit, constituting improper impeachment on a collateral issue. We agree.

During his first trial, Gardner testified on his own behalf. He admitted that he did not have a permit to carry a concealed weapon. When asked by the prosecutor to explain why at the time of his arrest he told Deputy Griggs that he had concealed weapon permit, Gardner explained that he misunderstood Deputy Griggs and thought that the officer was asking about a different type of permit (a hunting license) which would only require the gun's registration papers. The Commonwealth, at that time, introduced evidence of Gardner's trip to Commercial Printing, his subsequent arrest for forgery of concealed weapon permits, and his statement to police officers admitting he possessed fake conceal and carry permits. The Commonwealth asserts that introduction of this evidence, including that Gardner had forged a concealed deadly weapon permit before his arrest on September 24, 2004, was proper to rebut his earlier testimony that he misunderstood Deputy Griggs when the officer asked him if he had a permit to carry a concealed deadly weapon.

We disagree but find the error to be harmless and not warranting reversal.

Impeachment by contradiction regarding a collateral fact is prohibited. *Eldred v. Commonwealth*, 906 S.W.2d 694, 705 (Ky. 1994)(citing Lawson, *The Kentucky Evidence Law Handbook* (3d Ed. 1993) § 4.10). A collateral fact is one that could not have been introduced into evidence for a purpose independent of the contradiction. *Commonwealth v. Jackson*, 281 S.W.2d 891, 893-94 (Ky. 1955) *overruled on other grounds by Jett v. Commonwealth*, 436 S.W.2d 788, 792 (Ky. 1969). Further, "[i]t is generally recognized that a witness may not be impeached with respect to a matter which is irrelevant and collateral to the issues in the action." *Simmons v. Small*, 986 S.W.2d 452, 455 (Ky.App. 1998)(quoting *Jackson, supra*). "The purpose of this rule is 'to minimize confusion for the triers of fact by avoiding an unwarranted and endless proliferation of side issues.'" *Simmons*, 986 S.W.2d at 455 (quoting Lawson, *The Kentucky Evidence Law Handbook*, § 4.10 (3d ed., 1993)).

Whether Gardner understood Deputy Griggs when he claimed to have a concealed weapon permit is not essential to this case. Kentucky Revised Statute (KRS) 527.020(1) states:

A person is guilty of carrying a concealed weapon when he carries concealed a firearm or other deadly weapon on or about his person.

A person may carry a concealed weapon within the Commonwealth of Kentucky if they are properly licensed to do so pursuant to KRS 527.020(4). If Gardner had possessed the proper permit, he could have asserted this as an affirmative defense. An affirmative defense must be raised by the defendant. *Smith v. Commonwealth*, 313 Ky. 113, 230 S.W.2d 478, 479 (Ky. 1950). Gardner did not assert at trial that he was part of the class exempted from KRS 527.020(1). Therefore it was not necessary or proper for the Commonwealth to introduce evidence before the jury that had no connection to the issue at hand and could potentially prejudice them against Gardner.

Thus, in reviewing the trial courts error, we must follow Kentucky Rule of Criminal Procedure (RCr) 9.24. RCr 9.24 provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

We must therefore determine whether the error was prejudicial. The jury did hear evidence that in many circumstances could be

highly prejudicial. Gardner admitted to trying to obtain false documents, being arrested while out on bond for forgery, and possession of false documents. However, given the amount of evidence against Gardner, including his own admission that he was carrying a concealed deadly weapon, the admission of subsequent forgery charges did not affect the outcome of his case. We conclude that Gardner's substantial rights were not violated by any error in the admission of this evidence.

Gardner further argues that the trial court improperly allowed the Commonwealth to question Deputy Griggs about Gardner's past use of methamphetamine. Gardner concedes that this issue is unpreserved. He asks for review of the issue for palpable error pursuant to RCr 10.26.

Reversing a conviction based on palpable error requires this Court to determine that a manifest injustice occurred such that, when considering the entire case, there is substantial possibility that the result would have been different but for the error. *Partin v. Commonwealth*, 918 S.W.2d 219, 224 (Ky. 1996). Deputy Griggs testified that Gardner told him he had used methamphetamine, but was not addicted to it. Gardner argues that his use of methamphetamine is not at issue in this trial, but rather his possession of it was. The Commonwealth asserts this evidence was properly admitted as rebuttal evidence countering Gardner's assertion he did not know

the substance he was carrying on the night of September 24, 2004 was methamphetamine. We agree with the Commonwealth. There was no palpable error and it is our conclusion that Gardner's substantial rights have not been unduly affected.

Gardner next argues that the Commonwealth's Attorney had an obligation to remove himself under Kentucky Rule of Professional Conduct 3.7(a) during his May 2005 trial because he was likely to be called as a "necessary witness." Rule 3.7(a) states:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) The testimony relates to an uncontested issue;
- (2) The testimony relates to the nature and value of legal services rendered in the case; or
- (3) Disqualification of the lawyer would work substantial hardship on the client.

The Commonwealth's Attorney did not testify at trial and was not a necessary witness, thus, Gardner's argument must fail.

After his arrest, Gardner made two statements which were reduced to writing on his behalf. The Commonwealth's Attorney was present when Gardner made his first statement and transcribed it for him. A sheriff's deputy was also present at that time and witnessed both the statement and its transcription. The deputy testified to the accuracy of the statement at trial. The Commonwealth's Attorney was never in danger of being called as a

witness. We find no violation of the Kentucky Rules of Professional Conduct.

Next, Appellant contends there was insufficient evidence for the jury to find him guilty of forgery in the second degree.

KRS 515.030, in relevant part, states:

- (1) A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be or which is calculated to become or to represent when completed:
 - (c) A written instrument officially issued or created by a public office, public employee or governmental agency.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.

If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be granted. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true [and reserve] to the jury questions as to the credibility and weight to be given to [the] evidence.

Commonwealth v. Benham, 816 S.W.2d 186, 187-188 (Ky. 1991). If reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient to allow the case to go

to the jury even though it is circumstantial. *Commonwealth v. Sawhill*, 660 S.W.3d 3,4 (Ky. 1983). If the evidence cannot meet that test, it is insufficient. *Hodges v. Commonwealth*, 473 S.W.2d 811, 814 (Ky. 1971). The trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence. *Benham*, supra.

The prosecution produced evidence that was considerably more than a mere scintilla. Gardner was arrested for carrying a concealed handgun without the necessary license. While out on bond, Gardner attempted to have a commercial printing store make him photo identification cards and training completion certificates identical to those issued by a governmental agency. A subsequent search of Gardner's home uncovered three forged concealed deadly weapon permits, two of which had Gardner's picture on them. Gardner admitted to possessing the forged documents. Review of the evidence presented in this case clearly indicates that the trial judge correctly determined that a reasonable juror could fairly find guilt beyond a reasonable doubt.

Finally, Gardner argues that the jury instructions were so erroneous that reversal for a new trial is required. Gardner concedes that the issue is unpreserved. Gardner now objects to Instruction Four which stated:

You will find the defendant guilty of Second-Degree Forgery under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about October 11, 2004, and before the finding of the Indictment herein, he falsely made or caused to be made a Concealed Deadly Weapon's License purporting to have been issued by the Commonwealth of Kentucky, through the Muhlenberg County Sheriff's Office;

AND

B. That in so doing, it was the defendant's intention to defraud, deceive or injure some other person or persons.

Gardner contends that there is palpable error because Instruction Four mentioned the concealed deadly weapons permits he admitted to having, but failed to mention the certificates of completion Gardner requested Commercial Printing make for him. Gardner also asserts that Instruction Four should not have contained the language "caused to be made."

Gardner's trial counsel participated in the drafting of the jury instructions. He made no objection to Instruction Four at trial. Thus, not only were the alleged errors unpreserved, they were waived. *Davis v. Commonwealth*, 967 S.W.2d 574, 578 (Ky. 1998). The instructions do not justify reversal. Nothing in the record indicates any of the errors proposed by Gardner would have caused the jury to have decided differently. The errors, if any, did not result in manifest injustice so as to require a new trial.

For the foregoing reasons, the judgment of the
Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

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